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No. 93-643

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

BESSEMER & LAKE ERIE RAILROAD COMPANY,
Petitioner,

v.

REPUBLIC STEEL CORPORATION, *et al.*
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF THE NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

The National Motor Freight Traffic Association as *amicus curiae* will address the following question:

Whether the Court of Appeals for the Third Circuit correctly ruled that treble damages for antitrust violations may be recovered, despite this Court's decision in *Keogh v. Chicago & N.W. Ry.*, 260 U.S. 156 (1922), reaffirmed in *Square D Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409 (1986), based upon two claimed exceptions to those authorities:

- where tariff rates are the primary, but not exclusive, means of inhibiting competition, or
- where competitors of the defendant, rather than shippers, are the plaintiffs.

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BRIEF OF THE NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

The National Motor Freight Traffic Association, Inc. (NMFTA) is a voluntary, not-for-profit incorporated trade association whose members are motor common carriers of freight. NMFTA is the agent for publication of the National Motor Freight Classification, which is the tariff within which approximately 7,000 participating motor common carriers operating in interstate, intrastate, or foreign commerce pursuant to

certificates of public convenience and necessity issued by the I.C.C. and/or state regulatory agencies, publish their classifications applicable to property that they transport. That classification tariff in turn is identified as a governing publication in rate tariffs of all of NMFTA's participating carriers.

This Court has specifically ruled upon the standing of this association to represent the interests of participating motor common carriers, *National Motor Freight Traffic Association, Inc. v. United States,* 372 U.S. 246 (1963), and NMFTA has appeared before this Court in several other cases.

NMFTA authorized the filing of this Brief to advise the Court of the motor carrier industry's intense interest in the proper application of *Keogh v. Chicago & N.W. Ry.*, 260 U.S. 156 (1922). The continuing vitality and importance of that decision was expressly affirmed by the Court only seven years ago in *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986), a case in which some of NMFTA's members were named defendants.

The proper application of *Keogh* is important to NMFTA's members because their tariffs as filed with the Interstate Commerce Commission define both the extent of their service as common carriers and the compensation for those services. As the Court has observed, the Motor Carrier Act of 1980, *94 Stat. 793,* reformed the regulation of motor common carriers operating in interstate commerce. However it did not modify the duty of carriers, pursuant to *49 U.S.C. 10762,* to file their tariffs and to conform strictly to their provisions. See *Maislin Industries, U.S. v. Primary Steel,* 497 U.S. 116 (1990).

A huge volume of traffic moves each and every day subject to the tariff rates published by these carriers. NMFTA's principal members alone haul more than one hundred million shipments subject to tariff rates each and every year. Statistics published by the Interstate Commerce Commission reflect that in 1991 the larger motor carriers of property received more than $38 billion in common carrier revenue, as compared to more than $5 billion in contract carrier revenue.[1] In FY 1992, the ICC received 1,159,106 tariff filings by motor common carriers of property.

STATEMENT OF THE CASE

The statement of the case set forth in the Brief of Petitioner Bessemer & Lake Erie Railroad Company accurately sets forth a detailed account of the proceedings below, which will not be repeated here. The interest of NMFTA's members focuses upon the ruling by the Court of Appeals pertaining to the *Keogh* doctrine. While the Third Circuit acknowledged that ICC approved rates played a central role in the case, the Court ruled that *Keogh* does not apply to bar the plaintiffs' antitrust claims for two reasons. First, it ruled that *Keogh* does not apply to antitrust claims filed by competitors of the defendant. Consequently, it upheld the verdict for damages in favor of competing trucking companies and dock owners. Pet App. 36a. Second, it ruled that *Keogh* does not bar claims of shippers where the conspiracy alleged is one to "preclude competition" by "lower cost competitors," by means that include some conduct unrelated to rates. Pet. App. 29a, 32a.

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[1] 1992 Annual Report of the Interstate Commerce Commission, Table 5, p. 131.

REASONS FOR GRANTING THE WRIT

Both aspects of the Third Circuit's ruling call for review by this Court since they conflict with the decisions of other circuits as well as recent pronouncements by this Court. The exception crafted by the Third Circuit for suits by competitors is contrary to the ruling of the Sixth Circuit in *Pinney Dock & Transport Co. v. Penn Central Corp.*, 838 F.2d 1445 (6th Cir.)., *cert. denied*, 488 U.S. 880 (1980).

NMFTA's participating carriers operate in all 50 states and between the United States and Canada under tariffs on file with the ICC. The conflict between the Third Circuit and other circuits upsets the stability of settled antitrust doctrine and threatens its members with different rules, depending upon the circuit in which a plaintiff happens to commence a lawsuit. The importance of the freight that is moving subject to their tariff rates makes it imperative to resolve the conflict. Therefore, a writ of certiorari should be issued to review the decision, so as to ensure the uniform application of the antitrust laws to regulated industries.

THE COURT SHOULD GRANT REVIEW TO DETERMINE THE SCOPE OF THE *KEOGH* BAR TO PRIVATE ANTITRUST DAMAGE CLAIMS BASED UPON ALLEGEDLY NONCOMPETITIVE FILED RATES IN REGULATED INDUSTRIES.

The Third Circuit's conclusion that *Keogh* does not bar antitrust damage claims by competitors is contrary to this court's decision in *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439 (1945), to the decisions of other circuits, and to the rationale underpinning the filed rate doctrine. In *Keogh* the Court held that

the legal rights of parties with respect to rates subject to regulation by the ICC are defined by the tariffs filed with that agency. "Unless and until suspended or set aside, this rate is made, *for all purposes*, the legal rate." [emphasis added] 260 U.S. at 162-63. Consequently, no private treble damage action could be based upon a theory that, but for some allegedly anticompetitive conduct, a different rate would have applied.

The Third Circuit postulated that this doctrine does not apply to claims by competitors. But this Court ruled otherwise in *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439 (1945). There the State of Georgia claimed damages against northern railroads, and it sought such damages in two capacities: as owner of a railroad and as *parens patriae* of its citizens, including various port and dock interests. The Third Circuit considered *Georgia* inapplicable because the state's claim as owner of a railroad was referred to as a "makeweight." App. 37a n. 6. Nevertheless, this Court's decision in *Georgia* was not so circumscribed. This Court ruled that it was clear from *Keogh* alone that Georgia could not recover damages, either as owner of a railroad or as *parens patriae* of its nonshipper port and dock entities. It held that the reasoning and precedent of *Keogh* applied with "full force" to the claims asserted by the State of Georgia.

The opinion below acknowledged the split in the lower courts concerning the application of the *Keogh* doctrine to suits by competitors. In support of its decision that *Keogh* does not apply to such suits, the court cited *Kirkwood v. Union Electric Co.*, 671 F.2d 1173 (8th Cir. 1985) *cert. denied* 459 U.S. 1170 (1983); *Groton v. Connecticut Light & Power Co.*, 662 F.2d

921 (2d Cir. 1981), and *Barnes v. Arden Mayfair, Inc.*, 759 F.2d 676 (9th Cir. 1985).[2] On the other hand, the Third Circuit acknowledged that its holding conflicts directly with that of the Sixth Circuit in *Pinney Dock & Transport Co. v. Penn Central Corp.*, 838 F.2d 1445 (6th Cir.), *cert. denied*, 488 U.S. 880 (1980).[3]

The decision by the Third Circuit to permit antitrust damage suits by competitors, although suits by shippers are barred, is contrary to the plain terms of the Interstate Commerce Act, which makes the filed rate the only legal rate for all purposes. Competitors, as well as shippers or any other "interested party," may file complaints with the ICC against existing rates or petitions for suspension of new or changed rates. See *49 U.S.C. 10705, 10708, 11701.* Any "person" may file such a complaint which triggers a rate investigation. *Merchants Warehouse Co. v. United States*, 283 U.S. 501 (1931).

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[2] The latter case, *Barnes*, is questionable authority for claims filed with respect to tariff rates. Summary judgment was denied only because there were non-tariff claims which could independently support the suit, but summary judgment in favor of the only carrier defendant was affirmed.

[3] The Third Circuit's decision also is contrary to the recent decision of the Fourth Circuit summarily affirming the well reasoned analysis of the district court in *Lifschultz Fast Freight, Inc. v. Consolidated Freightways Corp.*, No. 92-2523, 1993 U.S. App. Lexis 16974 (4th Cir., July 6, 1993), *cert. pending*, No. 93-549, affirming 805 F. Supp. 1277, 1282 (D.S.C. 1992). There the district court agreed with the Sixth Circuit that three of the four reasons for the *Keogh* doctrine support its application to suits by competitors. However, the doctrine was merely a subsidiary reason for dismissal in that case, and the same result would have been reached regardless of *Keogh*.

This Court's decision in *Maislin Industries, U.S. v. Primary Steel,* 497 U.S. 116 (1990) reemphasized the status of the filed rate as the sole measure of legal rights under the Interstate Commerce Act. Citing *Keogh*, this Court reaffirmed the primacy of the filed rate as the legal rate for all purposes, *Id. at 128.* No act of the carrier could estop it from collecting or enforcing the filed tariff rate.

After *Maislin,* there can be no doubt about the continued vitality of the filed rate doctrine.[4] That doctrine is the linchpin of *Keogh*, and it can be given effect only when the filed rate governs the legal rights of all persons. The notion that the filed rate is the only legal rate with respect to some persons but not the only legal rate with respect to others simply makes no sense.

The Court also should review the other reason cited by the Third Circuit for ignoring *Keogh*, namely that the defendant's behavior involved both rate activity and actions that were not rate related. It held that *Keogh* does not apply because the purpose of the conspiracy was to preclude competition by thwarting market entry and the means employed were not exclusively rate related. This holding is squarely con-

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[4] One district court recently found *Maislin* a sufficient basis in itself to hold that *Keogh* extends to suits by competitors, not just customers. See *Wegoland, Ltd. v. NYNEX Corp.*, 806 F. Supp. 1112, 1116, n. 1 (S.D. N.Y. 1992) ("In light of the Supreme Court's 1990 decision in [Maislin], which expanded the [filed rate] doctrine to invalidate a forcefully and deliberately presented ICC policy, the Supreme Court's embrace of the filed rate doctrine can no longer be viewed as so tepid" as not to cover suits by competitors.).

trary to this Court's opinion in *Square D Co. v. Niagara Frontier Tariff Bureau,* 476 U.S. 409 (1986).

The argument that application of the *Keogh* doctrine may be avoided by demonstrating an anticompetitive purpose would create an exception that swallows the rule. Every conspiracy that may run afoul of the antitrust laws has an anticompetitive purpose. Every claim under Section 1 of the Sherman Act must feature a conspiracy to preclude or eliminate competition. *Board of Trade v. United States,* 246 U.S. 231, 238 (1918). The complaint in *Square D* alleged that the alleged conspiracy had a twofold purpose: (1) "to fix, raise and maintain prices," and (2) "to inhibit or eliminate competition for the transportation of freight by motor carrier." *Square D,* 476 U.S. at 412. Nevertheless, this Court ruled that the 1980 changes in regulation of the motor carrier industry had not affected the viability of the *Keogh* doctrine. Consequently the plaintiffs' claims for antitrust damages were barred.

Square D also involved claims that the defendants had engaged in anticompetitive actions that did not involve rates. That aspect of the case was discussed at greater length in Judge Friendly's decision in the Second Circuit, *Square D Co. v. Niagara Frontier Tariff Bureau,* 760 F.2d 1347 (2d Cir. 1985). After concluding that *Keogh* barred the plaintiffs' claims for damages arising out of rate-related conduct, the court turned to allegations raised at oral argument that the carrier's conduct included agreements "not to solicit or try to attract certain types of traffic," and that the carriers had engaged in boycotts and other actions interfering with others. *Id.* at page 1365. The Second Circuit's decision remanded the case to consider the

plaintiffs' right to an injunction and also to afford the plaintiffs an opportunity to amend their complaint to state a proper case for damages *limited to* non-rate related conduct. This Court's decision in *Square D* approved that disposition of the case by the Second Circuit. *Id* at page 414.

In the instant case, the plaintiff's were not required to limit their claim for damages to actions that did not involve filed rates. Instead, the court permitted a modicum of alleged non-rate related activity to become the fulcrum for the jury's verdict imposing huge treble damages allegedly caused by filed rates. Thus the non-rate related activity was permitted to become the proverbial tail wagging the dog.

This exception threatens to gut the *Keogh* doctrine. If the decision below is allowed to stand, it may be expected that future plaintiffs will routinely allege some incidental non-rate related conduct as a vehicle for avoiding *Keogh* in cases where filed rates are claimed to have resulted in antitrust damages.[5]

The Third Circuit's decision crafting an exception for claims that include some non-rate related conduct with an anticompetitive motive is inconsistent with the Sixth Circuit's decision in *Pinney Dock*, which involved the same defendants and the same alleged conspiracy. The Sixth Circuit expressly ruled that to

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[5] This mischief is not limited to antitrust claims. Recognizing that the rationale behind the *Keogh* doctrine applies with equal force to statutory claims under RICO, the courts of appeals have applied *Keogh* in that context also. *H.J. Inc. v. Northwestern Bell Telephone Co.*, 954 F.2d 485, 494 (8th Cir. 1992) *cert. denied*, 112 S.Ct. 2306 (1992); *Taffet v. Southern Co.*, 967 F.2d 1483, 1494 (11th Cir. 1992), *cert. denied*, 113 S.Ct. 657 (1992).

the extent a boycott or refusal to deal was manifested by the assessment of higher rates or charges, the claim ran afoul of *Keogh*. 838 F.2d at 1457.

The Third Circuit's decision threatens the collective ratemaking activities of motor carrier rate bureaus, which are authorized pursuant to *49 U.S.C. 10706*. All of NMFTA's members participate in the activities of the National Classification Committee, which is authorized by the ICC to collectively determine and publish a tariff which classifies by their transportation characteristics the thousands of commodities moving in commerce. In addition, most of its members also belong to one or more ICC authorized rate bureaus, which make it possible for them to create a nationwide network of interline motor carrier service at joint through rates. One of those bureaus, Niagara Frontier, was among the defendants in *Square D*, where this Court held that the *Keogh* doctrine precludes private plaintiffs from circumventing the statutory immunity by pleading "covert legal violations" of the rate bureau agreements. 476 U.S. at 417, n. 19. If the decision in the instant case is allowed to stand, private damage claimants hereafter will plead some incidental non-rate related conduct as the talisman for avoiding *Keogh* and recovering treble damages.

CONCLUSION

The foregoing considerations plainly warrant review of the Third Circuit's decision. As this Court noted in *Square D*, the *Keogh* doctrine "has been an established guidepost at the intersection of the antitrust and interstate commerce statutory regimes for some 6 1/2 decades." The Third Circuit's decision would topple that guidepost by creating exceptions that render *Keogh* a mere hollow shell. The importance of tariff filing throughout all of the the regulated industries, including the motor common carrier industry, plainly warrants review for the purpose of restoring uniformity among the circuits in application of that fundamental guidepost. The petition for writ of certiorari should be granted.

Respectfully submitted,

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